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Main Contents *(i.e. change chapters)*

Chapter 2: Search Warrants

2. SEARCH WARRANTS
2.1 ISSUANCE OF SEARCH WARRANT:

WARNING: **Validity of search or suppression of evidence determined by trial court, not by a Magistrate at a preliminary hearing!**

2.11 Sufficiency of Complaint (Affidavit)

CHECKLIST

1. Is affiant a Georgia-certified peace officer or designated employee of Department of Children and Youth Services seeking escaped juvenile? (see § 2.13A)

2. Is probable cause of crime stated? [OCGA 17-5-21].
   a. Reliability of evidence under ***Totality of circumstances*** (see 2.23)
   b. Reliability of person providing information (see 2.23C)
   c. Is there additional oral testimony which, when added to affidavit, supports finding of probable cause? [Tuggle, 149 App. 844, 256 SE2d 104 (1979]. Record supplemental information.

3. Is location of property to be searched in county of issuing court? [Lejune, 276 Ga. 179; 576 SE2d 888 (2003); Kirkland, 212 App. 672, 442 SE2d 491 (1994)] (see 2.15A).

4. Is place or person to be **searched** particularly described? (See 2.15C)

5. Is thing or person to be **seized** particularly described? (See 2.16)

6. Is it in writing, signed by attesting officer, under oath? [OCGA 17-5-21; Barnett, 136 App. 122, 220 SE2d 730 (1975); Henry, 277 App. 302, 626 SE2d 511 (2006) (signature must match officer in text of affidavit); see OCGA 17-5-21.1 for the variety of "signatures" allowable when search warrant is sought by video conference].

7. Is time of occurrence set forth? [Windsor, 122 App. 767, 178 SE2d 751 (1970)].

8. Is date and time **information obtained** stated? Is it timely? (See 2.23D)

9. Is it dated (issuance date)? But typo as to date not fatal [Jones, 289 App. 767, 658 SE2d 386 (2008)].

10. Is "No Knock" provision sought? (See 2.44)

2.12 Sufficiency of Search Warrant - CHECKLIST

WARNING: Validity of a search or suppression of evidence is an issue for the trial court, not a Magistrate at a preliminary hearing!

1. Is time and date of issuance set forth? [OCGA 17-5-22].

2. Is title and identity of judge set forth? [OCGA 17-5-22].

3. Is warrant recorded on warrant docket? Filing of warrants and affidavits suspended until warrant is executed or has been returned unexecuted. [OCGA 17-5-22].

4. Is warrant in duplicate? (Copy, including incorporated references (such as affidavits or exhibits referred to in warrant), to be left with person/place searched) [OCGA 17-5-24, -25; Groh v. Ramirez, 540 U.S. 551 (2004)].

5. Is it directed to all peace officers (may be directed to individual officer)? [OCGA 17-5-23, -24].

6. Does it require execution within ten days? [OCGA 17-5-25].

7. Does it command a peace officer to conduct a search? [OCGA 17-5-23].

8. Is place or person to be **searched** particularly described ?

9. Is thing or person to be **seized** particularly described? [Groh v. Ramirez, 540 U.S. 551 (2004)].

10. Does it require an immediate written return and inventory? [OCGA 17-5-29].

11. Is the applicant a peace officer (See **2.13**)? [OCGA 17-5-20].

12. Has judge made independent determination of probable cause? [Reid, 129 App. 660, 200 SE2d 456 (1973)].

13. Is it to be executed in county where judge then sitting? [OCGA 15-6-23; Allison, 129 App. 364, 199 SE2d 587 (1973)].

14. If "No Knock" warrant requested, does warrant specifically allow or deny? [See Jones, 127 App. 137, 193 SE2d 38 (1972)].

15. Warrant need not be under seal [OCGA 17-5-22].

2.13 Persons Authorized to Seek Search Warrants

A. Person seeking search warrant must be:

1. Georgia-certified peace officer [OCGA 17-5-20; Holstein, 183 App. 610, 359 SE2d 360 (1987)]; **OR**
2. Designated investigative employee of the Department of Children and Youth Services may also obtain a search warrant for the purpose of locating and apprehending children who have escaped from an institution or facility or have broken the conditions of their supervision [OCGA 49-4A-8];

B. Examples of persons who may not obtain search warrants:

1. Federal law enforcement officer [Williams, 171 App. 807, 321 SE2d 386 (1987) (DEA agent not qualified)];
2. Juvenile officer not peace officer [Huff v. Walker, 125 App. 251, 187 SE2d 343 (1972)].
3. Private citizens - search warrant may not issue upon application of private citizen or for aid in enforcement of personal, civil, or property rights [OCGA 17-5-20].

C. Qualified officers may seek search warrants from courts outside their own jurisdiction but should execute the warrant only jointly with officers of jurisdiction [Harber, 198 App. 170, 401 SE2d 57 (1990)(campus police off campus); Bruce, 183 App. 653, 359 SE2d 736 (1987) (municipal/adjacent county)].

2.14 Probable Cause (see **2.2**)

2.15 Location of property to be searched

A. Magistrate courts and other courts of inquiry may issue search warrants [O.C.G.A. § 17-5-21], even after indictment or accusation, not withstanding Uniform Rule provisions concerning assignment of related cases [Lejune, 276 Ga. 179; 576 SE2d 888 (2003)].

B. Venue - Location of property to be searched must be in county of issuing ***court*** [Lejune, 276 Ga. 179; 576 SE2d 888 (2003); Kirkland, 212 App. 672, 442 SE2d 491 (1994); *see also* OCGA 17-5-21.1 (judge may videoconference from elsewhere in state)].

C. Link to crime - There must be a link between the suspected crime and the locality to be searched [Staley, 249 App. 207, 548 SE2d 26 (2001)].

- Suspect's Home - Where there is probable cause to link a suspect to a crime there is normally probable cause to search suspect's residence. [Reeves, 197 App. 107, 397 SE2d 601 (1990) (Probable cause to believe Defendant has stored non-contraband items at home despite long lapse of time (11 months) and no special evidence indicating that items are there); see also Tedford, 195 App. 372, 393 SE2d 502 (1990)].
- Sex offender profile - Defendant's prior conviction for sex offense and present evidence of molestation at other locations ***insufficient*** to search Defendant's apartment for pornographic materials without evidence linking molestation to apartment or computer or evidence that pornographic materials were shown to victim [Staley, 249 App. 207, 548 SE2d 26 (2001)].
- Multiple Addresses - Search warrant obtained for 2 houses and van. Drugs found at one house and van with lease showing third address also in van. Presence of lease with drugs plus evidence defendant used multiple stash houses sufficient to search third location. [Baez, 217 App. 511, 458 SE2d 658 (1995)].

D. Description of premises to be searched - must be sufficient to enable prudent officer to locate premises with reasonable certainty [Minter, 206 App. 692, 693, 426 SE2d 169 (1992); Hardin, 174 App. 83, 329 SE2d 172 (1985)].

1. Not all errors in address preclude reasonable certainty of location [Price, 303 Ga.App. 867, 694 SE2d 712 (2010) (***normally address errors are fatal***, but detailed description of location of mobile home established only one location met warrant description - two related warrants read in conjunction); Fuller, 295 App. 439, 672 SE2d 438 (2009) (wrong county listed, but address, travel directions and issuing court were all correct); Lester, 278 App. 247, 628 SE2d 674 (2006) (transposed digits but defendant's actual address verified with landlord); Chambless, 165 App. 194, 300 SE2d 201 (1983) (incorrect mobile home lot, but name of occupant and other information showed correct lot); McNeal, 133 App. 225, 211 SE2d 173 (1974) (involved description of apartment in multiple occupancy structure)].
2. Missing address element on search warrant may not be fatal defect if in affidavit [Franks, 240 App. 685, 524 SE2d 545 (1999) (Exhibit incorporated by reference in search warrant, available to executing officer, and left at premises); Wells, 196 App. 133, 395 SE2d 296 (1990); Cuevas, 151 App. 605, 260 SE2d 737 (1979)]; ***however*** affidavit would have to be specifically incorporated by reference in the warrant, present with the officer executing the search, and a copy may have to be served upon the occupant [*see* Vaughn, 141 App. 453, 233 SE2d 848 (1977)]. **Caution** - language in Wells suggesting it does not matter if officers executing the warrant had the referenced description is inconsistent with Groh v. Ramirez, 540 U.S. 551 (2004).

3. Curtilage
   a. "Defined as 'the yards and grounds of a particular address, its gardens, barns, and buildings.'" [Thomas v. State, 300 Ga. App. 265, 684 SE2d 391 (2009), quoting McConville, 228 App. 463, 467(2), 491 SE2d 900 (1997)]. Central question is 'whether the area in question is so intimately tied to the home itself that it should be placed under the home's "umbrella" of Fourth Amendment protection.' [United States v. Dunn, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)].
   b. 'A warrant which authorizes the search of a particular dwelling extends by implication to areas within the curtilage of the dwelling. [Thomas v. State, 300 Ga.App. 265, 684 SE2d 391 (2009), quoting McConville, 228 App. 463, 467(2), 491 SE2d 900 (1997)]; Likewise, probable cause for search of dwelling extends to curtilage [Thomas].
4. Multi-unit dwellings - "a search warrant for an apartment house or hotel or other multiple-occupancy building will usually be held invalid if it fails to describe the particular subunit to be searched with sufficient definiteness to preclude a search of one or more subunits indiscriminately." [Fletcher, 284 Ga. 653, 655, 670 SE2d 411, 413 (2008), quoting 2 LaFave, Search & Seizure, § 4.5(b) at p. 479 (4th ed. 2004)].
   a. Search of multiple units - "'The warrant of a multi-unit structure will be valid where (1) there is probable cause to search each unit; (2) the targets of the investigation have access to the entire structure; or (3) the officers reasonably believed that the premises had only a single unit'" [Fletcher (evidence that likely perpetrator of assault lived in a house with victim in basement apartment creates probable cause for evidence in both living spaces), quoting United States v. Perez, 484 F.3d 735, 741 (5th Cir., 2007); *accord,* Carter v. State, 319 Ga.App. 609, 737 SE2d 714 (2013)(campus suite with common area and separate bedrooms); Braun v. State, 747 SE2d 872 (2013)(adjacent houses of father and son owned by father); Hines v. State, 317 Ga.App. 541, 731 SE2d 782 (2012) (adding vehicles including an RV used as residence in warrant)].
   b. Search of curtilage - With apartments, analysis of whether an area is within the curtilage of the dwelling to be searched, the curtilage of another apartment, or the common area accessible to all is a complicated issue of fact. In cases of doubt, it is best that the warrant specify the search of out-structures, and, if available, the affidavit contain facts justifying the conclusion that the structure is within the resident's exclusive control [Espinoza v. State, 265 Ga. 171, 454 SE2d 765 (1995). *Compare* Thomas v. State, 300 Ga.App. 265, 684 SE2d 391 (2009); United States v. Cannon, 264 F.3d 875, 881 (9th Cir.2001) (two locked storage areas in building separate from residence that were under the control of the owner of the residence were within the curtilage) *with* United States v. Concepcion, 942 F.2d

1170 (7th Cir.1991) (involving a building with five apartments other than the defendant's room); United States v. Barrios-Moriera, 872 F.2d 12 (2d Cir.1989) (concerning a multi-dwelling apartment complex); United States v. Eisler, 567 F.2d 814 (8th Cir.1977) (pertaining to an apartment complex); United States v. Cruz Pagan, 537 F.2d 554 (1st Cir.1976) (with an apartment, "a tenant's 'dwelling' cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his exclusive control"; common underground parking garage was not within curtilage); United States v. Anderson, 533 F.2d 1210 (D.C.Cir.1976) (discussing an eight-room boarding house); United States v. Perkins, 286 F.Supp. 259 (D.D.C.1968) (describing a five room boarding house)].

5. May follow item to be searched [Ferguson, 292 App. 7, 663 SE2d 760 (2008) (followed person with package to his car)]. (See also **2.15**F below).

E. Automobile - Location of automobile not necessary if description of car sufficiently detailed [Reed, 126 App. 323, 190 SE2d 587 (1972)]. However, if the car is located outside the county of the issuing court, the warrant is invalid [Lejune, 276 Ga. 179, 576 SE2d 888 (2003)].

F. Automobile at residence:

1. Home **and** Car - Cannot issue warrant including car where probable cause exists only for search of house [Crank, 217 App. 246, 441 SE2d 531 (1994)].
2. Auto leaving place of search - Where search warrant is obtained to search residence, surrounding curtilage, and vehicles, but no separate probable cause exists to believe contraband is in car, results vary on whether vehicle can be chased down, searched, and driver returned [*Compare* Martin, 211 App. 849, 440 SE2d 736 (1994) (permissible to stop occupant driving away just before search less than mile from house, handcuff driver to return, and drive truck back to premises) *with* Crank, 212 App. 246, 441 SE2d 531 (1994) (not permissible to deliberately wait until occupant drives off, stop 2-3 miles away on public road, drive car back and perform inventory search)].

G. Jails and prisons - Jail searches are subject to 4th Amendment requirement for warrant under some circumstances.
1. ***Convicted*** prisoners ***are not protected*** by the 4th Amendment against searches [Hudson v. Palmer, 468 U.S. 517 (1984); Henderson, 271 Ga. 264, 517 SE2d 61 (1999)].

2. ***Pretrial detainees*** have ***diminished*** 4th Amendment protections [Henderson (3); Thomas, 263 Ga. 85, 87, 428 SE2d 564 (1993). 4th Amendment does not apply to searches for security and maintenance purposes [Thomas] by jail personnel [*see* Evans v. Stephens, 407 F.3d 1272 (11th Cir., 2005) (distinguished evidentiary search by arresting officer)]; thus, clothes and property worn by Defendant upon arrival are subject to routine search without warrant [Batton, 260 Ga. 127, 391 SE2d 914 (1990), Marks, 280 Ga. 70, 623 SE2d 504 (2005) (even arresting detective could search briefcase voluntarily brought to jail when defendant arrested)].
3. When the prosecution seeks to search a pre-trial detainee for the purpose of uncovering incriminating evidence for use at trial, a warrant supported by probable cause is required [Henderson; U.S. v. Cohen, 796 F2d 20, 23 (2nd Cir. 1986)].

2.16 Property (Evidence) to be Seized

A. Particularity of description of items to be seized:

1. If full description is available but not in warrant, warrant may be invalid [Groh v. Ramirez, 540 U.S. 551 (2004)]:
   a. If the description of property to be seized is found in a document other than the warrant, such as the supporting affidavit, there must specific language to ***incorporate*** the other document ***by reference***, and it must be ***attached*** to the warrant;
   b. Officer executing warrant must have any incorporated document listing the items to be seized while executing the search, and the copy served upon the occupant should also have that document attached;
   c. A warrant failing to specifically describe the items to be seized is ***fatally defective***, and the executing officer can be held legally liable for relying on such a warrant.
2. Specificity of description is somewhat flexible, but warrant cannot leave selection of items to be seized entirely to judgment and opinion of officer [Dobbins, 262 Ga. 161, 415 SE2d 168 (1992), Strauss v. Stynchcombe, 224 Ga. 859, 165 SE2d 302 (1968)]. The searching officer may have to make determinations of fact, but not of opinion [Reaves, 284 Ga. 181, 664 SE2d 211 (2008); Strauss].
3. "Evidence of [specified crime]"
   a. Violation of Georgia Controlled Substance Act - Evidence relating to crimes of illegal drug possession and trafficking are generally sufficiently distinctive as to make such a description by the crime sufficiently particular [Fair, 284 Ga. 165, 664 SE2d 227 (2008)].

b. "Evidence of crime" - Such a description is ***insufficient***, amounting to an invalid general warrant [Groh v. Ramirez, 540 U.S. 551 (2004); Reaves, 284 Ga. 181, 664 SE2d 211 (2008)].
c. As residual clause after specific list (e.g., [specified items] "and other evidence of murder") - this is proper and the specified items will limit the interpretation of the general evidence clause [Andresen v. Maryland, 427 U. S. 463, 481-482 (III) (1976); Reaves, 284 Ga. 181, 664 SE2d 211 (2008)]. When the warrant authorizes seizure of papers connected with the crime, cursory review of unrelated papers to determine if they are elevant is permissible [*Reaves*].

Query - Do these residual clauses for evidence of a specified crime, such as in Reaves v. State, 284 Ga. 181, 664 SE2d 211 (2008) and State v. Rogers, 319 Ga.App. 834, 738 SE2d 667 (2013) permit routine seizures of computers and cell phones which may contain both private papers and photos and notes that would be evidence of a specified crime? [*See* Hawkins v. State, 307 Ga. App. 253, 704 SE2d 886 (2010)]. Photos and notes are now typically kept in digital form on a variety of media. Prior case law suggests that searches of computer files require exact descriptions [Compare Grant, 220 App. 604, 469 SE2d 826 (1996) with Walsh, 236 App. 558, 512 SE2d 408 (1999)]. Given the intrusiveness and disruption caused by such seizures, magistrates may wish to specifically include or exclude such sources of electronic files when issuing a warrant with a residual clause.

d. Reaves and Fair ***do not provide clear guidance for*** non-drug cases where the warrant specifies merely authorizes ***search for evidence of a specified crime without specific examples***, but do suggest that in some cases such a description would be too broad [*See also* Smith, 274 App. 106, 110(3), 616 SE2d 868 (2005) (search warrant's general description of evidence of '"child molestation and sexual exploitation of children in violation of OCGA § 16-12-100.2" was sufficient'); Maddox, 272 App. 440, 444(2), 612 SE2d 484 (2005) (taken as a whole, search warrant was sufficiently specific where it authorized the seizure of all items contained within a specified motel room which is evidence of the crime of Insurance Fraud')].
e. Error - Typo is warrant description where affidavit correct ***may*** be OK where searching officers are looking for correct item [Norton v. State, 320 Ga.App. 327, 739 SE2d 782 (2013) (pc for warrant was for meth, warrant authorized seizing marijuana)].

4. The description should provide clear limits to the search and not leave it to the discretion of the officer to determine which items are to be seized [Grant, 220 App. 604, 469 SE2d 826 (1996)].

5. Generic description of items to be seized permissible ***if unavoidable*** [Dugan, 130 App. 527, 203 SE2d 722 (1974)]; Maddox, 272 App. 440, 612 SE2d 484 (2005) ("all items contained within [specified motel room] at the time of the fire" and remaining there where probable cause related to fraudulent fire insurance claim and recorded statement said nothing removed from house); *but see* [Dobbins, 262 Ga. 161, 415 SE2d (1992)] for First Amendment materials (see B7, below).
6. Full description especially needed for First Amendment items [Dobbins] (see B7, below).

B. Types of items to be seized:

1. Search warrant needed for bodily samples, such as blood [Slavny, 195 App. 818, 395 SE2d 56 (1990)], leg hair [Price, 194 App. 453, 390 SE2d 664 (1990)], dental impressions [Harris, 260 Ga. 860, 401 SE2d 263 (1991)], urine or stomach contents [Beck 216 App. 532, 455 SE2d 110 (1995)], whether or not person searched is in custody [Price].
   a. Fact that arrest warrant has issued does not, by itself, show probable cause for search of bodily substances such as hair, blood, etc. Search warrant affidavit required to show separate probable cause for search. [Toney, 215 App. 64, 449 SE2d 892 (1994)].
   b. Actual procedure may be performed by technician [Harris, 260 Ga. 860, 401 SE2d 263 (1991); Twiggs v. State, 315 Ga.App. 191, 726 S.E.2d 680 (2012) (computer files and FBI tech)].
   c. Surgery generally not permitted, but minor intrusions OK, including extraction of subcutaneous bullet under **local** anesthetic where **no** danger to life or limb [Creamer, 229 Ga. 511(2), 192 SE2d 350 (1972); *see* Schmerber v. California, 384 U.S. 757 (1966)]. Where surgery is not minor or requires use of **general** anesthetic, court may not authorize surgery, and testimony as to defendant's refusal to submit to surgery is inadmissible [Curry, 217 App. 623, 458 SE2d 385 (1995); Winston v. Lee, 470 U.S. 753 (1985)].
2. Tangible evidence - – Search warrants are generally available only to "seize" tangible evidence [OCGA 17-5-21(a)(5) (other categories are generally specific types of" tangible" evidence)].
   • Sense-enhancing technology - use of sense-enhancing technology not in general public use (aiming a thermal imager) on a house requires a search warrant [Kyllo v. United States, 533 U.S. 27, 38-40 (III) (2001); *compare* Dow Chemical Co. v. United States, 476 U.S. 227, 236–237 (1986) (greater latitude for warrantless inspections in commerical property)], but such measurements are not "tangible evidence" under OCGA 17-5-21, so a search warrant would not be available [Brundige v. State, 291 Ga. 677, 735 SE2d 583 (2012)]. Under at least some circumstances, acquiring information from a pre-installed GPS device may require and other forms of digital

capture ***may*** require search warrant [United States v. Jones, 132 S.Ct. 945 (2012) (concurring opinions of Alito and Sotomayor ("I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection"), together constituting a majority of court]. Jones casts doubt on cases such as [United States v. Knotts, 460 U.S. 276, 281 (II) (1983); Devega, 286 Ga. 448, 453-54 (2010) (pinged cell phone). which permit GPS location so long as vehicle is in public location. If trespass required, GPS use clearly invalid; if not, may be invalid under the concurring opinions.

3. Trespass analysis revalidated by [United States v. Jones, 132 S.Ct. 945 (2012) (use of GPS locator without warrant improper if placed through trespass)]. Any case law approving of warrantless search through common law trespass is now questionable. Cases which state that "technical" unlawful trespass does not invalidate search may have to be reconsidered [e.g., Stephenson v. State, 171 Ga.App. 938, 321 SE2d 433 (1984)].
4. Private papers [Brogdon, 287 Ga. 528, 697 SE2d 211 (2010)].
   a. Warrant may authorize seizure ***only*** of **private papers** which are designed, used, or intended for use in the commission of the offense for which warrant issued ("instrumentalities of a crime") [OCGA 17-5-21(a)(5)].
      - Can't seize private papers merely as tangible evidence of offense or of other unrelated offenses [OCGA 17-5-21(a)(5)].
   b. Only papers in possession of accused are private papers, hospital records cannot be considered in patient's possession despite patient's HIPAA privacy rights [Brogdon, 287 Ga. 528, 697 SE2d 211 (2010)].
   c. Private papers are documents that record the author's personal thoughts, such as diaries, personal letters, and similar documents. They did not include public records business licenses, ledgers, desk calendars, employment contracts, checks, deposit slips, or other financial records which do not contain private thoughts. [Ledesma, 251 Ga. 885, 311 SE2d 427 (1984); Flemister v. State, 317 Ga.App. 749, 732 SE2d 810 (2012); Smith, 192 App. 298, 384 SE2d 410 (1989); *but see* Grant, 198 App. 732, 403 SE2d 58 (1991) (checkbook is private paper)].
   - Private papers ***were*** (1993-2009) limited to papers covered by privilege (attorney-client, doctor-patient, etc.) [Sears, 262 Ga. 805, 426 SE2d 553 (1993); ***overruled by*** Brogdon, 287 Ga. 528, 697 SE2d 211 (2010) which restored the pre-1993 case law]. Note that the private papers doctrine is based upon US Supreme Court authority which was adopted in OCGA 17-5-21 before being overruled.

CAUTION - Private papers may include files on a cell phone or computer [Hawkins v. State, 307 Ga. App. 253, 704 SE2d 886 (2010)]. Hawkins stated an electronic storage device is "like a container that stores thousands of individual containers in the form of discrete files" — just because there is cause to "enter" the computer does not necessarily mean there is cause to open all the files. Hawkins dealt with a search incident to an arrest without a warrant, but it seems likely that private paper doctrine will be applied to computer files and similar electronic storage so that a warrant as to a computer should limited and specific in terms of what search is authorized. See also **2.16B7** re First Amendment protection of computer files and images.

5. Attorney files - Search warrants directed at "**documentary evidence**" in possession of an attorney must be issued only by a ***superior court judge*** **unless** there is probable cause that the attorney committed a crime. "Documentary evidence" includes but is not limited to writings, documents, blueprints, drawings, photographs, computer printouts, microfilms, X-rays, files, diagrams, ledgers, books, tapes, audio and video recordings, and papers of any type or description [OCGA 17-5-32]. This prohibition is in addition to the prohibition on seizure of private papers.
6. Conversations (oral, wire, or electronic) may be intercepted and recorded without a search warrant where one adult party to the conversation consents. For a minor to consent requires approval of a Superior Court judge [OCGA 16-11-66]. Non-consensual interception (**wiretapping**) requires a Superior Court investigative warrant [OCGA 16-11-64]; but there is no standing to challenge if one is not the phone subscriber and one's voice is not recorded [Deleon-Alvarez v. State (Ct. App. #A13A1000, 11/14/2013)].

NOTE - Electronic location of a device (such as a beeper or GPS device on cell phone) may require a warrant if Defendant is in a private location such as his house [United States v. Karo, 468 U.S. 705 (1984)], but requires no warrant if he is in a public location such as a car on the highway [United States v. Knotts, 460 U.S. 276, 281 (II) (1983); Devega v. State, 286 Ga. 448, 453-54 (2010) (pinged cell phone).

In contrast, secretly placing a GPS device on a car is a search and requires a warrant, supported by probable cause [United States v. Jones, 132 SCt 945, 181 LE2d 911 (2012); Hamlett v. State, 323 Ga. App. 221, 746 SE2d 843 (2013) (4-3 decision finding lack of probable cause)].

If a jail phone message warns inmates that it is monitored, no warrant is needed to record conversations [Boykins-White, 305 Ga.App. 827, 701 ES2d 221 (2010)].

7. **First Amendment materials** - this issue typically arises in obscenity cases and sexual offenses where material is sought to show the sexual proclivities of the defendant -
   a. Books, videotapes, computer images and files are presumptively First Amendment materials
   b. Must be described with special particularity: "a warrant authorizing the seizure of materials presumptively protected by the First Amendment may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may 'focus searchingly on the question of obscenity.'" [Dobbins, 262 Ga. 161, 415 SE2d 168 (1992) (quoting New York v. P. J. Video, 475 U.S. 868, 873-874 (1986); Kramer, 260 App. 546, 580 SE2d 314 (2003). Examples:
      - Pornographic (adult) video tapes - affidavit for search warrant for video tapes must contain sufficient information for judge to form own opinion that tapes are obscene (due to First Amendment implications of such seizures). This was despite fact that seizure was for use in molestation case and not for prosecution under obscenity statutes (however, the outcome ***might*** have been different with more evidence that tapes were instruments of the crime (see c below)) [Dobbins, 262 Ga. 161, 415 SE2d 168 (1992)] (child had seen outside cover of one tape "with pictures of 'boys and girls' involved in 'the sex act.'"); *but see* Smith, 274 App. 106, 616 SE2d 868 (2005) ("materials involving Child Molestation and Sexual Exploitation of Children including but not limited to pictures, computers, and videos. ..." adequate)].
      - Computer search description - must specify files to be searched [Compare Grant, 220 App. 604, 469 SE2d 826 (1996) with Walsh, 236 App. 558, 512 SE2d 408 (1999)].
   c. Instrument of crime - A search warrant seeking material used in furtherance of the crime or involving victims of crime is subject to less stringent standards [Cooper, 212 App. 34, 441 SE2d 448 (1994), see Brown, 260 App. 627, 580 SE2d 348 (2003) ("receipts" OK)].
8. Medical records - Search warrant (without pre-issuance adversary hearing) is OK for obtaining medical records [King, 276 Ga. 126, 577 SE2d 764 (2003) (hospital blood alcohol test to be used in DUI)]. In contrast, when a subpoena is issued, defendant has right to pre-issuance hearing [King, 272 Ga. 788, 535 SE2d 492 (2000)].

IN THE MAGISTRATE COURT OF _____ COUNTY, GEORGIA

Search Warrant Docket #_____

AFFIDAVIT & APPLICATION FOR A SEARCH WARRANT

The undersigned, being duly sworn, deposes and says: I am a duly sworn, POST certified law enforcement officer in the state of Georgia charged with the duty to investigate criminal activity and enforce the criminal laws of this state.

This is an application for a search warrant and my affidavit in support hereof. Pursuant to O.C.G.A. 17-5-20, et. seq., I am making this sworn affidavit setting forth that there exists probable cause to believe that:

A. specific offense(s) is/are being committed/have been committed; and
B. specifically described property and items and/or persons are to be searched for and seized and constitute evidence of these specific offenses; and
C. the property and items and/or persons constituting evidence to be searched for and seized are located at the particular place to be searched.

There is probable cause to believe that the following crime(s) (is being/has been/have been) committed. (List all applicable offenses and code sections.)

Offense(s)	Code Section(s)

The list of certain property, items, articles, instruments, and person(s) to be searched for and seized are located in _____ County, Georgia and are specifically described as follows:

The foregoing described property, items, articles, instruments and person(s) to be searched for and seized constitute evidence connected with the foregoing listed crime(s) and is/are: (check ALL that are applicable) (O.C.G.A. 17-5-21)

[ ] designed for use in the commission of the crime(s) herein described.
[ ] intended for use in the commission of the crime(s) herein described.
[ ] has/have been used in the commission of the crime(s) herein described.
[ ] stolen; **[ ]** embezzled; property;
[ ] contraband, the possession of which is unlawful.
[ ] tangible evidence of the commission of the crime(s) set forth above.
[ ] a person who has been kidnapped in violation of the laws of this state or who has been kidnapped in another jurisdiction and is now concealed within this state.
[ ] a human fetus; **[ ]** a human corpse.
[ ] a person for whom an arrest/fugitive warrant has been issued (Brown v. State, 240 App. 321)

Original AFFIDAVIT. & SEARCH WARRANT to Court; 1 Original AFF & SW to Officer;

1 SW for premises - Affidavit shall not be served upon the premises unless incorporated by SW.

The facts establishing probable cause in searching for and seizing the foregoing specifically described person(s), property, items, articles, instruments connected with the foregoing crime(s) at the location described herein are: (Set forth facts connecting all crimes, all items to searched for & seized, at the location to be searched.)

The geographic location of the above listed specifically described person(s), property, items, articles, instruments to be searched for and seized is within _____ County, Georgia, and is more particularly described as follows:

[ ] NO KNOCK PROVISION SOUGHT: I am seeking a "No Knock" provision so that entry can be made without knocking and without giving verbal notice of the lawful authority and purpose in execution of this search warrant. There are reasonable grounds to believe that the giving of verbal notice would: (check applicable)

[ ] greatly increase the peril to officer(s) executing this warrant;
[ ] lead to the immediate destruction of the evidence sought.

In support, thereof, I state the following facts:

I swear or affirm that all of the information contained in this Affidavit and all other testimony given by me is true and correct to the best of my knowledge and belief.

Signature: _____ Agency: _____

Name: (Print legibly) _____ Badge No: _____

Sworn to and subscribed before me, this _____ day of _____, 20 ____.

[ ] ORAL TESTIMONY, GIVEN UNDER OATH, RECEIVED AND RECORDED

[ ] ORAL TESTIMONY NOT CONSIDERED

Signature: _____ _____ Magistrate Court

Magistrate: (Print legibly) _____ STATE OF GEORGIA

Original AFFIDAVIT. & SEARCH WARRANT to Court; 1 Original AFF & SW to Officer;

1 SW for premises - Affidavit shall not be served upon the premises unless incorporated by SW.

IN THE MAGISTRATE COURT OF _____ COUNTY, GEORGIA

Search Warrant Docket #_____

SEARCH WARRANT

TO ANY LAWFUL OFFICER TO EXECUTE AND RETURN:

AFFIDAVIT having been made before me by _____, a POST certified law enforcement officer, of the following agency,_____, charged with the duty to investigate criminal activity and enforce the criminal laws of the state of Georgia and that said officer has reason to believe **that on the premises within _____ County, Georgia, known as and more particularly described as:**

There is probable cause to believe that the following crime(s) (is being/has been/have been) committed. (List all applicable offenses and code sections.)

Offense(s)	**Code Section(s)**

The list of certain property, items, articles, instruments, and person(s) to be searched for and seized are located in _____ County, Georgia and are specifically described as follows:

The foregoing described property, items, articles, instruments and person(s) to be searched for and seized constitute evidence connected with the foregoing listed crime(s) and is/are: (The judge shall initial ALL that are applicable) (O.C.G.A. 17-5-21)

(Judge's initials)

_____ designed for use in the commission of the crime(s) herein described.

_____ intended for use in the commission of the crime(s) herein described.

_____ has/have been used in the commission of the crime(s) herein described.

_____ stolen; _____ embezzled; property;

_____ contraband, the possession of which is unlawful.

_____ tangible evidence of the commission of the crime(s) set forth above.

_____ a person who has been kidnapped in violation of the laws of this state or who has been kidnapped in another jurisdiction and is now concealed within this state.

_____ a human fetus; _____ a human corpse.

_____ a person for whom an arrest/fugitive warrant has been issued. (Brown v. State, 240 App. 321)

Original AFFIDAVIT. & SEARCH WARRANT to Court; 1 Original AFF & SW to Officer;

1 SW for premises - Affidavit shall not be served upon the premises unless incorporated by SW.

I am satisfied that there is probable cause to believe that the certain person(s), property, items, articles, and instruments, specifically described herein, is/are being concealed on the premises/person(s) above described and that reasonable grounds exist for the application and issuance of this search warrant.

You are hereby commanded to immediately search the above described premises/person(s), for the above list of specifically described person(s), property, items, articles, instruments and making the search at any time of the day or night and if any of the above-listed person(s), property, items, articles, and instruments can be found to seize them. You shall leave a copy of this warrant and a receipt listing any person(s), property, items, articles, and instruments seized. A written inventory, signed under oath by the officer executing this search warrant , listing the person(s), property, items, articles, and instruments seized shall be prepared without unnecessary delay and shall be returned to me or to any judicial officer of this court. (O.C.G.A. 17-5-29)

EXECUTION OF SEARCH WARRANT: This search warrant shall be executed within ten days from the time of issuance. If the warrant is executed, the duplicate copy shall be left with any person from whom the listed person(s), property, items, articles, and instruments were seized; or if no person is available, the copy shall be left in a conspicuous place on the premises particularly described above. Any search warrant not executed within ten days from the time of issuance shall be void and shall be returned to this court. (O.C.G.A. 17-5-25)

USE OF FORCE IN EXECUTION OF SEARCH WARRANT: Necessary and reasonable force may be used to effect an entry into any building or property or part thereof to execute this search warrant if, after verbal notice, or an attempt in good faith to give verbal notice, by the officer directed to execute the same of the officer's authority and purpose:

(1) The officer is refused admittance;
(2) The person or persons within the building or property or part thereof refuse to acknowledge and answer the verbal notice or the presence of the person or persons therein is unknown to the officer; or
(3) The building or property, or part thereof, is not then occupied by any person. (O.C.G.A. 17-5-27)

DETENTION AND SEARCH OF PERSON(S) ON THE PREMISES: In the execution of the search warrant the officer executing the same may reasonably detain or search any person in the place at the time. The scope of the detention and search must be reasonably limited to the purposes of:

(1) protecting an officer from attack; or
(2) preventing the disposal or concealment of any instruments, articles, or things particularly described in the search warrant. (O.C.G.A. 17-5-28)

_____ (Judge's Initials)

"**NO KNOCK PROVISION." (NOT VALID UNLESS INITIALED BY THE JUDGE.)**

It appearing from affidavit docketed in this case, and such sworn oral testimony as may have been noted, if any, on the application for this search warrant, that there are reasonable grounds to believe that the giving of verbal notice would:

_____ (Judge's Initials) greatly increase the peril to officer(s) executing this warrant;

_____ (Judge's Initials) lead to the immediate destruction of any of the list of property articles and instruments ordered to be seized.

SO ORDERED, this _____ day of _____, 20_____, at _____o'clock, ____. M.

Signature: _____ _____ Magistrate Court

Magistrate: (Print legibly) _____ STATE OF GEORGIA

Original AFFIDAVIT. & SEARCH WARRANT to Court; 1 Original AFF & SW to Officer;

1 SW for premises - Affidavit shall not be served upon the premises unless incorporated by SW.

IN THE MAGISTRATE COURT OF _____ COUNTY, GEORGIA

Search Warrant Docket #_____

RETURN OF SEARCH WARRANT & INVENTORY

(Include the entire search warrant & affidavit to insure proper & accurate docketing.)

I, the undersigned officer, received the search warrant on the date and time set forth upon the search warrant and have executed it as follows:

[ ] I did not execute the search warrant and I am returning it to this court.

[ ] I did execute the search warrant and I am filing the return and inventory as follows:

On the _____ day of _____, 20_____, I searched the premises particularly described in this search warrant for the specifically listed **person(s), property, items, articles and instruments.**

I left a copy of the warrant, together with the receipt of the seized person(s), property, items, articles, instruments,

[ ] with the following person, _____.

[ ] left in a conspicuous place on the premises particularly described in the Search Warrant.

The following is an inventory of the property person(s), property, items, articles and instruments seized pursuant to execution of this search warrant:

[ ] See the attached list, consisting of _____ pages, labeled _____.

This inventory was made in the presence of_____.

I swear that the above is a true and detailed account of the listed person(s), property, items, articles and instruments seized by me at the execution of this search warrant.

Signature: _____ Agency: _____

Name: (Print legibly) _____ Badge No: _____

Sworn to and subscribed before me, this _____ day of _____, 20 ____.

Signature: _____ _____ Magistrate Court

Magistrate: (Print legibly) _____ STATE OF GEORGIA

Original AFFIDAVIT. & SEARCH WARRANT to Court; 1 Original AFF & SW to Officer;

1 SW for premises - Affidavit shall not be served upon the premises unless incorporated by SW.

Original AFFIDAVIT. & SEARCH WARRANT to Court; 1 Original AFF & SW to Officer;

1 SW for premises - Affidavit shall not be served upon the premises unless incorporated by SW.

2.18 Citations: STATUTES and RULES

Child pornography - obtaining records from internet provider [OCGA 35-3 -4.1(a)(1); *see* Henderson v. State, 320 Ga. App. 553, 740 SE2d 280 (2013)].

Confidential informants not to be disclosed by court except by court order after motion, hearing, and in camera review [URMC § 6(c)].

DUI cases - Search warrant may issue for bodily fluid sample independent of implied consent [OCGA 40-5-67.1(d.1); negating Collier, 279 Ga.316, 612 SE2d 281 (2005)].

HIV tests - where during a crime there is "significant exposure" under statutory definition an HIV test may be ordered ***by Superior Court*** [OCGA 17-10-15].

Requirements for affidavit (verified complaint) supporting application for search warrant? [OCGA 17-5-21].

Video search warrants - Applications may be heard by video conference. The judge should have visual and audible contact with all affiants and witnesses and the signature of the judge and affiant may be typed, affixed by electronic stylus, or any other reasonable means which identifies the affiant (statute requires retention of a copy of video) [OCGA 17-5-21.1]. Judge can participate from anywhere in the state, but judge's court must have venue for the county where the property is.

Wiretap information in search warrant or affidavit is probably required to be sealed and not made a part of public record [OCGA 16-11-64].

Citations: CASES

Absence of original affidavit supporting warrant not fatal regardless of whether it was filed with court where affidavit was presented to magistrate and photocopy of affidavit was produced [Bolt, 230 App. 760, 498 SE2d 371 (1998)].

Affidavit requirements - although affidavit may be supplemented by oral testimony (or taped sworn statement), there must be a written signed statement (verified complaint) under oath underlaying the warrant [Barnett, 136 App. 122, 220 SE2d 730 (1975)].

Anticipatory search warrant requires probable cause both that triggering provision will happen ***and*** that triggering event gives probable cause for search [United States v. Grubbs, 547 U.S. 90 (2006)]. Search warrant laying out detailed procedures to follow in controlled buy of drugs at residence could authorize search ***if*** drugs obtained in buy there [Smith, 278 App. 315, 628 SE2d 722 (2006)].

Appointment of senior judge without defined scope (by time or cases) was invalid, voiding his warrant [Kelley, 302 Ga.App. 850, 691 SE2d 890 (2010)].

Blood sample - warrant does not have to specify amount of sample to be taken, if amount taken is actually reasonable [Johnson v. State, 320 Ga.App. 231, 739 SE2d 718 (2013) (remanded by Sup. Ct. for reconsideration of other grounds 11/4/2013)]. By implication, the warrant does not have to lay out the procedure to be followed in general.

Compelling Defendant to produce handwriting or voice exemplar impermissible under *Georgia* Constitution [Creamer, 229 Ga. 511(2), 192 SE2d 350 (1972); Armistead, 152 App. 453, 390 SE2d 663 (1990); see Price, 194 App. 453, 390 SE2d 664 (1990) (can force Defendant to ***submit*** to act, not to ***do*** an act); but see Coe, 243 App. 232, 234, 533 SE2d 104 (2000) (submission to breath, urine, or blood test can be compelled despite cooperation required for producing breath sample)].

Consent to urine test for bond purposes does not allow use of information in separate criminal proceeding for possession of illegal drug if defendant is not informed of possible use for additional charges [Beasley, 204 App. 214, 419 SE2d 92 (1992)].

Confidential informant - analysis of confidential informant in marginal case [*see* Rogers, 274 App. 546, 618 SE2d 166 (2005); *see also* Copeland, 273 App. 850, 616 SE2d 189 (2005) (gave information in last month on "one occasion that led to the recovery of a quantity of illegal drugs.")].

Convicted prisoners are not protected by the 4th Amendment against searches [Hudson v. Palmer, 468 U.S. 517 (1984); Henderson, 271 Ga. 264, 517 SE2d 61 (1999)].

Detention of occupants while police obtain warrant approved (1½ hours) [Clark, 217 App. 113, 456 SE2d 672 (1995)].

Dog sniffing luggage [O'Keefe, 189 App. 519, 376 SE2d 406 (1988)] or car [Montford, 217 App. 339, 457 SE2d 229 (1995)] is not a search. Dog's reaction can then provide probable cause for search warrant. *But see* [Florida v. Jardines, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013) (bringing drug dog to front door of house was an improper warrantless search because it exceeded scope of implied consent to approach front door)].

Drug dogs - probable cause - the reliability of a drug dog is to be judged through a common sense totality of the circumstances test and not through meeting any abstract or exacting certification standard such as is found for scientific evidence at trial [Florida v. Harris, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013)}. *Contrast* Carr v. State, 267 Ga. 701, 482 SE2d 314 (1997) (Harper standards applied in refusing admission of dog alert as evidence ***at trial*** for arson).

Hotel rooms - Occupied rooms have same protections as private residence [Elliot, 274 App. 73, 616 SE2d 844 (2005)].

Identity of person [Holloway, 134 App. 498, 215 SE2d 262 (1975)].

Illegal wiretap [Toomey, 134 App. 343, 214 SE2d 421 (1975)].

"Instrumentality of a crime" as descriptor of items to be seized in warrant were found to include violent writings with references to killings and guns, and therefore within the scope of the description of the property to be seized, but the case did not analyze whether they were "private papers" and stated that they should have been excluded from evidence as more prejudicial than probative [Pitchford v. State (Sup. Ct. #S13A0884)].

Invalid judge - No "de facto" magistrate where no position created under OCGA 15-10-20(a) (by superior court and county commission), despite approval of salary by county administrator. "De facto" judge requires "de jure" position. Warrant signed by such person, even at oral direction of chief magistrate is invalid and fruits of search must be suppressed [Beck, 283 Ga. 352(1), 658 SE2d 577 (2008)]. Designation of senior judge issuing warrant nullity without scope or length of assistance [State v. Kelley, 302 Ga. App. 850, 691 SE2d 890 (2010)].

No telephone oaths - Oaths must be administered in official's presence; thus, there can be no oath administered over the telephone [Redmond v. Shook, 218 App. 477, 462 SE2d 172 (1995); *but see* Sanders, 155 App. 274, 270 SE2d 850 (1980) (corrections to search warrant by phone approval of judge)]. Thus, search warrant could probably not be based upon testimony taken over the phone.

Oral testimony may supplement affidavit [Riggins, 136 App. 279, 220 SE2d 775 (1975)].

Privacy expectation less in commercial property, particularly closely regulated industries [NY v. Burger, 482 U.S. 691 (1987)]. See **2.49**, Administrative Searches.

Probable cause [Harris, 331 U.S. 145; Patterson, 126 App. 753, 191 SE2d 584 (1972)].

Probable cause - close case reversal [Hamlett v. State, 323 Ga. App. 221, 746 SE2d 843 (2013) (4-3 decision found lacking)].

Probable cause statement out of place on affidavit no defect [Butler, 130 App. 469, 203 SE2d 558 (1973)].

Refusal of search - fails to p 614 SE2d 744 (2005)].

Repeat searches OK *if* probable cause to believe item may have been placed there since last search [Dixon rovide probable cause and should be disregarded [Miley, 279 App. 420,, 197 App. 369, 399 SE2d 275 (1990)].

Taped sworn statement incorporated by reference in affidavit but not reduced to writing due to press of time OK [Williams, 188 App. 334, 373 SE2d 42 (1988)].

2.2 PROBABLE CAUSE FOR SEARCH

2.21 Standard of Proof

A. "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying the hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." [Illinois v. Gates, 462 U.S. 213 (1983); Stephens 252 Ga. 181, 311 SE2d 823 (1984); *accord*, Lejune, 276 Ga. 179, 576 SE2d 888 (2003)].

B. Does not require as much proof as preponderance of the evidence [Stephens, 252 Ga. 181, 311 SE2d 823 (1984); Monroe v. Sigler, 256 Ga. 759, 353 SE2d 23 (1987); In the Interest of A. S., 293 App. 710, 667 SE2d 701 (2008); Williams, 269 App. 616, 604 SE2d 640 (2004)]. Articulable suspicion is less than probable cause, and considerably less than preponderance of the evidence [Illinois v. Wardlow, 528 U. S. 119, 123-24 (2000)].

C. "[P]robable cause is a ***fluid*** concept -- turning on the assessment of probabilities in particular factual contexts -- not readily, or even usefully, reduced to a neat set of legal rules. . . . Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'" [Illinois v. Gates, 462 U.S. 213, 232-35 (1983)]. Magistrate has discretion "to draw such inferences, *or to refuse to draw them if he is so minded"* [Id., 462 U.S. at 240]

D. Accordingly, "magistrate's determination of probable cause should be paid great deference by reviewing courts"[Illinois v. Gates, 462 U.S. 213, 236 (1983) (on motion to suppress in search warrant context); Palmer, 285 Ga. 75, 673 SE2d 237 (2009) (deferential standard of review)].

2.22 Hearsay - Search warrants are normally based all or in part on hearsay. Hearsay supports valid warrant *if* magistrate is informed of some of underlying circumstances supporting reliability of information [U.S. v. Ventresca, 380 U.S. 102, 108 (1985)]. Must always be substantial basis for believing hearsay [Smith, 136 App. 17, 220 SE2d 11 (1975)].

A. Oral Testimony - oral testimony to the magistrate prior to issuance is of equal weight to matters in the affidavit [Flewelling, 300 Ga.App. 505, 685 SE2d 758 (2009); Franklin, 135 App. 718(1), 218 SE2d 641 (1975)].

B. ***Conclusory*** statements are ***insufficient*** - Reliability of informer and information provided must be established by underlying ***facts*** presented to judge sufficient for ***independent determination by judge,*** not merely the officer's conclusions of reliability [Fair, 284 Ga. 165, 664 SE2d 227 (2008); Bryant, 210 App. 319, 320, 436 SE2d 57 (1993); Wesson, 237 App. 789, 516 SE2d 826 (1999)].

C. Omitted information - Reliability of tipster/informant must be shown in record of what was presented to magistrate and ***cannot be shown by information not disclosed to magistrate*** [Land, 259 App. 860, 578 SE2d 551 (2003); Lyons, 258 App. 9, 572 SE2d 632 (2002) (controlled buy "that unquestionably would have established the informant's reliability"); Pailette, 232 App. 274, 501 SE2d 603 (1998); see Lejune, 276 Ga. 179, 576 SE2d 888 (2003)]. In contrast, ***unreliability*** of informer may be shown based upon information known to officer but not disclosed to magistrate [Lyons, 258 App. 9, 572 SE2d 632 (2002); Robertson, 236 App. 68, 510 SE2d 914 (1999)].
   - Age of victim - in crime against minor, mother's statement that defendant was having sex with daughter sufficient under totality of circumstance despite omission of specific statement in affidavit that daughter was minor [Phillips, 283 App. 319, 641 SE2d 294 (2007)].
   - Omitted information that suspect had not been seen at girlfriend's apartment during 6 weeks of surveillance not problem where he had no other address and there were other indicia tying him to location; omitted information ***does not negate deference*** to magistrate's determination [Hunter, 282 Ga. 278, 646 SE2d 465 (2007)].
   - Bias of witness and exculpatory information - where officer omitted information that source wanted custody of defendant's child and omitted exculpatory information without showing basis of sources information or corroboration by investigation, search was invalid [Owens, 285 App. 370, 646 SE2d 340 (2007)], but when wife stated that defendant is addicted to drugs, omission of fact that wife was estranged, defendant claimed to be currently clean and that father-in-law stated defendant did not appear under the influence on the day in question, did not negate probable cause [Herrera v. State, 288 Ga. 231, 702 SE2d 854 (2010)] (Both decisions construe the evidence to uphold trial court decision.)
   - Omission of indicia of unreliability may be offset by independent corroboration through investigation [Davis, 281 App. 855, 637 SE2d 431 (2006); *see* Bryant v. State, 288 Ga. 876, 708 SE2d 362 (2011) (informant not disclosed as jail house inmate, but he provided some past information, some future information (general time of mailing, recipient of letters) and many supporting details)].
   - Can't use info provided by informant to show status as more than

"tipster" where it can't be corroborated [Harper, 283 Ga. 102, 657 SE2d 213 (2008) (caller stated he was concerned citizen from defendant's church, but police had no basis to verify ID); *see* Fair, 284 Ga. 165, 664 SE2d 227 (2008)].

D. False and illegally obtained information

1. If information is shown by preponderance of evidence to deliberately false or presented in reckless disregard for the truth, then probable cause will be evaluated based upon remaining information with ***false info excised*** [Franks v. Delaware, 438 U.S. 154 (1978); Evans, 263 App. 572, 588 SE2d 764 (2003)]; and material omissions added [Moss, 275 Ga. 96, 102-103(13), 561 SE2d 382 (2002) (see **C**)]
2. Similar analysis for illegally obtained info - is the untainted information sufficient to support probable cause? [Brundige v. State, 291 Ga. 677, 735 SE2d 583 (2012) (1st warrant improper, eliminating fruits of 1st warrant, still sufficient probable cause); Pando, 284 App. 70, 76(2)(a), 643 SE2d 342 (2007); Baker, 295 App. 162, 671 SE2d 206 (2008)(bad lineup)] If legally obtained information provides probable cause for search warrant, illegal previous entry prior to warrant will not void search [Smithson, 275 App. 591, 621 SE2d 783 (2005)] (see **4.15**D);
   In contrast, where a finding of probable cause depends on information obtained through illegal search, observations through trespass, or unauthorized intrusion into protected area with sense-enhancing equipment, warrant will normally be "fruit of the poisonous tree"[Mitchell v. State, 747 SE2d 900 (2013); United States v. Jones, 132 S.Ct. 945 (2012) (revalidating common-law trespass analysis);] (see **3.14A-D** (plain view and when intrusions on property are not trespass), **2.16B**2 (sense-enhancing devices)].
3. *Miranda* - warrant based upon ***voluntary*** statement ***taken in violation of Miranda rights*** is OK [United States v. Patane, 542 U.S. 630, 641-642(III) (2004); Woods, 280 Ga. 758, 632 SE2d 654 (2006)].
4. Failure to disclose informant's criminal record to judge ***may*** justify suppression [Palmer, 291 App. 157, 661 SE2d 146 (2008) (here combined with imperfect search of informant before controlled buy); *but see* Zorn, 291 App. 613, 662 SE2d 370 (2008) (upheld decision not to suppress despite non-disclosure of record)].

E. Police officer may normally rely on hearsay related to another officer [Meneghan, 132 App. 380, 208 SE2d 150 (1974); Walthall, 281 App. 434, 636 SE2d 126 (2006) (New Hampshire Officer)], but affiant must be aware of facts supporting reliability of underlying hearsay and relate them to magistrate [Griffin, 154 App. 361, 268 SE2d 412 (1980)].

F. Double hearsay may be used but each link must be credible [McTaggart,

285 App. 178, 645 SE2d 658 (2007) (2 police officers); Johnson, 265 App. 777, 595 SE2d 625 (2004) (concerned citizen to officer to officer); Smith, 136 App. 17, 220 SE2d 11 (1975)].

- Reliability of informer does not establish reliability of hearsay of third party [Holloway, 286 App. 129, 648 SE2d 473 (2007) (if hearsay source for concerned citizen's information is unstated, it is an "anonymous tip," *but see* **3.21**C1, Note); Munson, 206 App. 76, 424 SE2d 290 (1992)], including statements of person arrested due to confidential informer's efforts [Wesson, 237 App. 789, 516 SE2d 826 (1999)], or fact that informer had no known reason to lie and did not know that the information would be related to the police [Wood, 214 App. 848, 449 SE2d 308 (1994)].

G. Voluntary statements taken in violation of Miranda rights may be used to justify search [Reaves, 284 Ga. 181, 664 SE2d 211 (2008)].

2.23 Totality of Circumstances - Probable cause is shown under a ***totality of the circumstances*** test - information upon which the search warrant is based must be shown to be reliable. Reliability is shown in two ways: ***inherent reliability of the evidence*** or ***reliability of the person providing the information***;

A. Traditional test - The affiant was required to state the underlying circumstances showing:

1. the informant's reliability, and
2. the source of the informant's information [Aguilar v. Texas, 378 U. S. 108 (1964); Spinelli v. United States, 393 U. S. 410 (1969)].

NOTE - Informant may establish probable cause independent of Aguilar, Spinelli under totality of circumstances test of Gates [462 U.S. 213 (1983)]. However, Stephens [252 Ga. 181, 311 SE2d 823 (1984)] and Gates are outer limit of probable cause and Aguilar/Spinelli standard should be followed whenever possible [See Wells, 180 App. 133, 348 SE2d 681 (1986)].

B. Inherently reliable information - under some special circumstances, the nature of the evidence is so compelling that no special showing of the reliability of the informant is required:

1. Correct future predictions of conduct [Swanson, 210 App. 896, 412 SE2d 630 (1991); Johnson, 197 App. 538, 398 SE2d 826 (1990); see Alabama v. White, 496 U.S. 325 (1990)]; in these cases the informer provides information predicting conduct by the suspect and the police officer then waits and verifies that the predictions come true.

Examples of ***insufficient*** information:

a. Information about Defendant's appearance, his car and tag number, his address and where he banked was insufficient to provide confirmation of reliability [Bryant, 210 App. 319, 436 SE2d 57 (1993)].
b. An anonymous tip that Defendant is carrying a gun does not even provide "articulable suspicion" for a *Terry* search for weapons for officer safety. [Florida v. J.L., 529 U.S. 266 (2000) (specifically ***excludes*** analysis of ***bomb tips***)].
c. Phone call to unidentified "drug dealer" by arrested drug user to set up cocaine buy and identification of "dealer's" car insufficient to stop car when someone drives it off ten minutes after call [Davenport, 268 App. 704, 603 SE2d 624 (2004)].
d. Address, car, and fact that subject is wanted in another state similarly insufficient to corroborate tip [Lyons, 258 App. 9, 572 SE2d 632 (2002)].
e. Arrestee for possession of drugs on his person implicating car owner/driver as source (supporting search warrant for his residence) not corroborated by knowledge of his residence, his criminal record, smell of marijuana in car, or fact that he was seen conversing with owner outside his residence [Willis, 302 Ga.App. 355, 691 SE2d 261 (2010)].

2. Overcomes known bias - future prediction of conduct can make information reliable despite known bias of source.
3. Details of crime - Where an informer provides details of crime which allegedly come from defendant and are not available through the news media, such details corroborated his information in a manner similar to future predictions [Henderson, 271 Ga. 264, 517 SE2d 61 (1999) (fellow jail inmate)] - need "insider information" Florida v. J.L., 529 U.S. 266 (2000)].

C. Reliability of person providing information:

1. Criminal record - where criminal record is known to police, it is always relevant and should be disclosed to magistrate [Davis, 281 App. 855, 637 SE2d 431 (2006)].
2. Anonymous tipsters - information from anonymous tipsters has no inherent reliability and must be supported by appropriate prediction of future conduct or details of the crime (see B1a-b, above).

3. Named informant making statement against penal interest - "When a ***named*** informant makes a declaration against penal interest and based on personal observation, that in itself provides a substantial basis for the magistrate to credit that statement" [Graddy, 277 Ga. 765, 596 SE2d 109 (2004); *accord*, Hardy, 162 App. 797, 798(2), 292 SE2d 902 (1982) (name provided in oral testimony to magistrate)]. Need not be a formal confession and court should not make a highly legalistic interpretation of statement [Graddy]. Statement against interest, being in custody, and setting up and personally appearing for controlled buy and personally ID of suspect all factors adding to credibility of named suspect of unknown reliability [Lopez, 292 App. 518, 664 SE2d 866 (2008)].
   - ***Statement against interest credibility cannot be extended to*** uncorroborated statements made by ***unnamed informants*** [Wesson, 237 App. 789, 516 SE2d 826 (1999)].
   - Not against penal interest to finger supplier of drugs when arrested [Willis, 302 Ga.App. 355, 691 SE2d 261 (2010)], but stating one helped manufacture drugs at supplier's residence is [Martis, 305 Ga.App. 17, 699 SE2d 349 (2010) (corroboration also present)].
4. Named victims - Crime victims have also been held to be inherently reliable sources [Smith, 274 App. 106, 616 SE2d 868 (2005); Miller, 219 App. 213, 216(2), 464 SE2d 621 (1995) (both cases involving sexually abused minors apparently without criminal records)]. In some cases, this has *questionably* been extended to unidentified alleged crime witnesses calling 911. (See Appendix **3.21**C1, Note).
   - 911 complainant who gives name is an identified crime victim for articulable suspicion for stop, not tipster, even when he cannot later be found. Prolonged detention, however, became illegal arrest without probable cause after complainant failed to appear as promised for more than 40 minutes. [Grandberry, 289 App. 534, 658 SE2d 161 (2008)]. In most ***warrant*** applications, there has been time to determine whether the named victim exists.
5. ***"Concerned citizens"*** enjoy elevated credibility but affidavit must show ***facts*** justifying such characterization; conclusory statements are insufficient [White, 196 App. 685, 396 SE2d 601 (1990); Eaton, 210 App. 273, 435 SE2d 756 (1993); Pailette, 232 App. 274, 501 SE2d 603 (1998)]. Where the concerned citizen's information is obviously based on ***hearsay***, the elevated credibility does ***not*** apply; instead, it must be shown that the hearsay comes from a reliable source [Holloway, 286 App. 129, 648 SE2d 473 (2007) (if source unstated, it is an "anonymous tip," *but see* **3.21**C1, Note)].

   Insufficient:
   - Tipster's description of self over telephone as "concerned citizen" provides no evidence of reliability unless verified [Eaton; *accord*, Sutton v. State, 319 Ga.App. 597, 737 SE2d 706 (2013)(correct info on defendant's vehicle, residence and past ownership of business did not enhance credibility)];

- Mature, employed person "who has a reputation for being truthful in the source's community" and "seemed credible to officer" [Pailette].
- Where officer previously arrested tipster, not "concerned citizen" [Rucker, 276 App. 683, 624 SE2d 259 (2005)].

Sufficient:

- Officer's statement that the informant was personally known to him as law-abiding citizen, that his demeanor was truthful, ***plus*** that some key facts were corroborated by investigation. [Thompson, 215 App. 189, 450 SE2d 283 (1994)];
- Officer's statement that the informant was personally known to him as law-abiding citizen, that his demeanor was truthful, ***plus*** no criminal record and an explanation of citizen's motivation from past experience of drug effects on family [Dearing, 233 App. 630, 505 SE2d 485 (1998); *accord,* Price v. State, 297 Ga. App. 501, 677 SE2d 683 (2009)];
- Employee (hotel housekeeper) making job-related report to supervisor (false report could result in termination) of presence of drugs [Glass, 304 Ga. App. 414, 696 SE2d 140 (2010)].
- When a person claims to have just witnessed a crime and reports it face to face to the police they may be considered a concerned citizen [Durden v. State, 320 Ga.App. 218, 739 SE2d 676 (2013)].

6. Other named informants:
   - Face-to-face informants more reliable because of demeanor observation and accountability for false info [Cole, 282 App. 211, 638 SE2d 363 (2006)].
   - The fact that an informant is named, however, is not enough alone to establish the informant's credibility [Lejune, 276 Ga. 179, 576 SE2d 888 (2003); *accord*, Rucker, 276 App. 683, 624 SE2d 259 (2005) (no prediction of future conduct or facts not easily obtainable); *see also* Davenport, 268 App. 704, 603 SE2d 624 (2004) (just arrested possessor of drugs with no history as informant treated as tipster); *but see* Wright, 272 App. 423, 612 SE2d 576 (2005) (***known source with known bias*** (ex-spouse in custody dispute who set up drug purchase) treated as more reliable than anonymous tipster but, importantly, tip ***predicted future actions***); Lough, 276 App. 495, 623 SE2d 688 (2005) (named informant plus knowledge and observation of defendant by officer). *Compare* St. Fleur, 286 App. 564, 649 SE2d 817 (2007) (*insufficient* - police hear arrestee-informant's side of conversations about drug purchase, but no meet set up so no future conduct predicted (warrant)) *with* Patton, 287 App. 18, 650 SE2d 733 (2007) (cooperating arrestee sets up drug transaction, police hear her side of set-up conversation, car, time and place of meeting as predicted) and Bryant, 284 App. 867, 644 SE2d 871 (2007) (one side of set-up conversation for drug buy and appearance at location

with consistent behavior as predicted before frightened off)].

7. Confidential informant - mere conclusory statement that person is a reliable confidential informer is not probative [Bryant, 210 App. 319, 436 SE2d 57 (1993); Claire, 247 App. 648; 544 SE2d 537 (2001) (police from another jurisdiction)] - should show:
   a. type of information previously supplied;
   b. how that information was used (i.e. to find contraband or obtain convictions) (e.g., informant is personally known to affiant, has provided useful information in the past which has led to convictions in x cases);
   c. time elapsed since information obtained [Kessler, 221 App. 368, 471 SE2d 313 (1996); *see* Rocha, 284 App. 852, 644 SE2d 921 (2007)].

   It is ***not necessary*** for all three of the factors to be shown as long as the magistrate has sufficient information to make an independent analysis [Claire, 247 App. 648; 544 SE2d 537 (2001)]. Confidential informant is treated as anonymous tipster unless there is factual information to show reliability. Officer ***should*** also inform court if informant was paid and advise of known criminal record of informant but failure to do so will not normally invalidate warrant where informant has provided reliable information in the past [Hockman, 226 App. 521, 487 SE2d 102 (1997); Perkins, 220 App. 524, 469 SE2d 796 (1996); Kessler; but see Robertson, 236 App. 68, 510 SE2d 914 (1999); Land, 259 App. 860, 578 SE2d 551 (2003)].
   - For example of showing credibility of first-time informant [*see* Lopez, 292 App. 518, 664 SE2d 866 (2008)];
   - Lack of specific underlying info showing reliability of informants balanced by consistent multiple sources and independent verification of some facts [Chambliss, 298 App. 293, 679 SE2d 831 (2009) ("totality of circumstances"];
   - If past reliability of informant is not shown and alleged "controlled buy" is not monitored by police, then reliability insufficient [Chatham v. State, 323 Ga.App. 51, 746 SE2d 605 (2013)];
   - Where reliability of confidential informant sufficiently shown, no other corroboration of facts provided by him is needed [Williams v. State, 303 Ga. App. 222, 692 SE2d 820 (2010)].
8. Collective knowledge of police officers - information from police officers is considered inherently reliable [Eppinger, 231 App. 614, 500 SE2d 383 (1998); Claire, 247 App. 648; 544 SE2d 537 (2001) (police from another jurisdiction)].
9. Judge may also infer facts from circumstantial evidence from police officers:
   a. Controlled buy - Confidential informant searched for drugs and given money. Gives money to unknown third party who enters house and comes back with drugs and no money. Probable cause to search house [Clark, 217 App. 113, 456 SE2d 672 (1995). Compare interrupted buys in Patton, 287 App. 18, 650 SE2d 733

(2007) (cooperating arrestee sets up drug transaction, police hear her side of set-up conversation, car, time and place of meeting as predicted) and Bryant, 284 App. 867, 644 SE2d 871 (2007) (one side of set-up conversation for drug buy and appearance at location with consistent behavior as predicted before frightened off) *with* St. Fleur, 286 App. 564, 649 SE2d 817 (2007) (*insufficient* - police hear informant's side of conversations about drug purchase, but no "meet" set up, so no future conduct predicted (warrant))].

- Where buyer not under constant surveillance, case is "marginal," but magistrate's determination that buy made informant credible under totality of circumstances is upheld [Pass v. State, 309 Ga. App. 440, 710 SE2d 641 (2011)].

b. Drug dog alert [O'Keefe, 189 App. 519, 376 SE2d 406 (1988)].

D. Timeliness/Staleness of information

1. Timeliness of information must be shown or it is treated as too stale by default [Land, 259 App. 860, 578 SE2d 551 (2003); Shivers, 258 App. 253, 573 SE2d 494 (2002); see Lyons, 258 App. 9, 572 SE2d 632 (2002) ("recent past")]. "'Time is assuredly an element of the concept of probable cause.' In reviewing a search warrant application, the magistrate must inquire into whether 'the conditions described in the affidavit might yet prevail at the time of issuance of the search warrant.' If the prior circumstances relied on to establish probable cause have grown stale with time, they are unlikely to provide a reliable barometer of present criminal conduct. This is not to say that 'the precise date of an occurrence is . . . essential. . . .'" [Land]:
   a. Drug selling operation - 'when the affidavit indicates the existence of an ongoing scheme to sell drugs, the passage of time becomes less significant than would be the case with a single, isolated transaction.'" [Land];
   b. Odor of marijuana - may establish probable for prompt search of ***car*** [Folk, 238 App. 206, 521 SE2d 194 (1999); Patman, 244 App. 833, 537 SE2d 118 (2000) (less expectation of privacy)] but does not provide probable cause to search ***residence*** two days later [Shivers, 258 App. 253, 573 SE2d 494 (2002)]; odor of unburned marijuana [Pando, 284 App. 70, 643 SE2d 342 (2007) (insufficient by itself even for immediate search of ***residence***)]; "odor of burning marijuana suggests that marijuana is still present, whereas the smell of marijuana smoke merely suggests that marijuana was present in the past" [Charles, 264 App. 874, 876 (2), 592 SE2d 518 (2003) (insufficent); Patman (additional); *but see* Taylor, 254 App. 150, 150-152(1), 561 SE2d 833 (2002) (prior complaints, smell of marijuana smoke on suspects, reentry into ***residence*** without

explanation by a suspect creating exigency to enter, plain view of marijuana - sufficient)];

c. Weapon and attire - 4 weeks to 9 months have been approved as not stale on case specific analysis - non-perishable, non-consumable items of continuing utility [In re: A.Z., 301 Ga.App. 524, 687 SE2d 887 (2009); Amica v. State, 307 Ga. App. 276, 704 SE2d 831 (2010)] .

d. Residence - suspect's absence during 6 weeks of surveillance of girlfriend's apartment OK when he had no other address, she listed him as employer, he had lived with her in past, suspect drove car registered to her, and fled in direction of her apartment, ½ mile away [Hunter, 282 Ga. 278, 646 SE2d 465 (2007)];

e. Pornography related to sexual offense - years of delay OK given such material on computer not likely to be affected by time [Birkbeck, 292 App. 424, 665 SE2d 354 (2008) (digital photos not perishable - incest-themed pornography - years old); Walthall, 281 App. 434, 636 SE2d 126 (2006) (child pornography - 3 months)].

2. Staleness - if affidavit fails to indicate how recent the information is, it would be considered stale and fail to establish probable cause [Gilliam, 124 App. 843, 186 SE2d 290 (1971].

3. Present tense - use of present tense in affidavit (e.g., suspect is engaged in activity) can be enough to show timeliness [Clark, 141 App. 886, 234 SE2d 713 (1977)].

2.3 AMENDMENTS TO WARRANT

2.31 Amendments may be made to affidavit and warrant based upon sworn testimony establishing probable cause, even by a ***another*** judge of the court [Green, 275 Ga. 569, 570 SE2d 207 (2002)].

2.32 Address corrections (minor) may be authorized by original judge by telephone [Sanders, 155 App. 274, 270 SE2d 850 (1980) (different hotel room); Oliver, 161 App. 567, 568, 287 SE2d 698 (1982) (changing street address from 506 to 206)] and may even be authorized by second magistrate [Smith, 205 App. 848, 424 SE2d 60 (1992)]. But if the address change is more than a typo, it would be advisable to have proper sworn testimony (see "No telephone oaths" above).

2.4 EXECUTION OF WARRANT

2.41 Time of execution

A. May execute warrant at any reasonable time [OCGA 17-5-26] ***within ten days*** [OCGA 17-5-25; King, 200 App. 801, 804, 409 SE2d 865 (1991); see Banks, 185 App. 760, 762, 365 SE2d 855 (1988) (warrant "expires")].
   - No requirement that analysis of item seized be accomplished within certain time frame - analyzing hard drive is not second search requiring a new warrant [Mastrogiovanni v. State (Ct. App. #A13A1179, 11/15/2013)].
   - Time limitation for execution need not appear in the warrant [Johnson v. State, 320 Ga.App. 231, 739 SE2d 718 (2013) (remanded by Sup. Ct. for reconsideration of other grounds 11/4/2013)]. Many warrants include such language as a reminder for executing officers.

B. Execution before arrival of warrant - Search may commence after issuance of the warrant and informing those present of search warrant based upon information relayed by telephone or radio, but, at end of search, copy of warrant would still need to be left at scene or with person searched [Rocco, 255 App. 565, 566 SE2d 365 (2002)].

2.42 Persons Conducting Search

A. Execution by Expert - Police may use expert under their general supervision to make impressions, draw blood, search for records, etc. [Harris, 260 Ga. 860, 401 SE2d 263 (1991)].

B. Other Third Parties - while it may be appropriate to employ civilian experts if necessary to execute the search [Harris, 260 Ga. 860, 401 SE2d 263 (1991)], persons not needed for the search, such as news media may not come along [Wilson v. Layne, 526 U.S. 603 (1999); Hanlon v. Berger, 526 U.S. 808 (1999)].

2.43 Property seized

A. Only contraband and property described in warrant.

B. Mixed property cannot be seized; officer can only seize property known to be contraband (drugs or stolen property) or items authorized by warrant and must separate and leave other property [Grant, 220 App. 604, 469 SE2d 826 (1996)]. There is no burden on the defendant to specify which items were improperly seized when it is shown that the seizures were overbroad.

2.44 Announcement of Authority - Knock on door and verbal notice by the officer announcing authority and purpose (to execute search warrant) is normally required in executing search warrants [OCGA 17-5-27]

A. Forced entry where "no-knock entry" not authorized:

1. Entry is refused;
2. The persons inside refuse to acknowledge verbal announcement - in executing a drug search ***without a "no-knock" provision***, a 3-5 second delay before entry is sufficient [Swan, 257 App. 704, 572 SE2d 64 (2002); *see* United States v. Banks, 540 U.S. 31 (2003) (15-20 second wait sufficient)].
3. Property is unoccupied or believed to be unoccupied

B. "No-knock" searches - may be authorized in search warrant where particularized allegation in affidavit as to increased peril to officers or danger that evidence would be destroyed [Adams, 201 App. 12, 410 SE2d 139 (1991); Richards v. Wisconsin, 520 U.S. 385 (1997)]:

1. May not be routinely issued in drug cases [Adams; Richards; State v. Barnett, 314 Ga.App. 17, 722 SE2d 865 (2012)(single report of unclear reliability of firearm 5 months earlier insufficient)];
2. However, the standard is not high [Richards; Braun v. State, 747 SE2d 872 (2013) (prior arrests for battery and weapons charge); Cook, 255 App. 578, 565 SE2d 896 (2002) (prior record of 2 arrests and 1 conviction for battery is sufficient particularized info in drug (cocaine) case)]; arrests are sufficient for probable cause for danger [*Braun*].
3. Magistrate may consider officer's knowledge of suspect's reputation [Caffo, 247 Ga. 751, 279 SE2d 678 (1981); *see also* Neal, 173 App. 71, 325 SE2d 457 (1984)];
4. Where no-knock is authorized or performed without any individual grounds (e.g., just because it is a drug case), items seized are suppressed [Williams, 275 App. 612, 621 SE2d 581 (2005) (drug case with authorization for no-knock in warrant); Poole, 266 App. 113, 596 SE2d 420 (2004) (officers failed to adequately knock and announce); *compare* Smithson, 275 App. 591, 621 SE2d 783 (2005) (prior arrest for sale of narcotics, information about *sale* of narcotics, and assertion that guns are often present at sales justifies no-knock)].

C. Officer can show probable cause for "no-knock" entry in advance; however, "magistrate's decision not to authorize a no knock entry should not be interpreted to remove officers' authority to exercise independent judgment concerning the wisdom of a no knock entry at the time the warrant is being executed" [Richards v. Wisconsin, 520 U.S.385 (1997); *accord*, Neal, 173 App. 71, 325 SE2d 457 (1984)]; Poole, 266 App. 113, 596 SE2d 420 (2004)].

NOTE - "Knock and announce" is recognized as a constitutional rule under the 4th Amendment [Wilson v. Arkansas, 514 U.S. 927 (1995)], but suppression of evidence is not *constitutionally* required [Hudson v. Michigan, 126 S.Ct. 2159, 165 L.Ed.2d 56(2006)]. Georgia has, however, recognized suppression as the appropriate remedy for illegality in execution of a search warrant, including violation of statutory mandated "knock and announce [OCGA 17-5-27, -30 ("suppress ... [where] warrant was illegally executed"); Poole, 266 App. 113, 596 SE2d 420 (2004); Barclay, 142 App. 657, 236 SE2d 901 (1977) (common law rule dating to 1603); *see* Gary, 262 Ga. 573, 577, 422 SE2d 426 (1992); *but see* Jackson, 280 App. 716, 634 SE2d 846 (2006) (which distinguished Poole (statutory basis for suppression not present), but then also noted that suppression was no longer required under the 4th Amendment)].

2.45 Detention or search of persons at or near the premises

A. May search persons ***named*** in search warrant
   - Authorization in warrant to search "any person found on the premises" ***does not*** authorize searches not justified by independent probable cause or articulable suspicion of danger or concealment [Holmes, 240 App. 332, 525 SE2d 698 (1999)].

B. May ***search*** persons found on or entering the premises ***only*** if there are particular facts justifying articulable suspicion of:

   1. Need to protect officer from attack with articulable suspicion particularized to this individual [Ybarra v. Illinois, 444 U.S. 85 (1981) (drug raid at bar - can't frisk patron without particular cause); Clark, 235 App. 569, 510 SE2d 319 (1998) (drug raid at rough biker bar doesn't give reasonable fear particularized to a patron making no threatening moves or comments - can *ask* patrons if they have weapons)]; **but** *generalized danger* in drug raid (on Halloween party) may authorize police to order persons in attendance to get on the floor [Imperial, 218 App. 440, 461 SE2d 596 (1995)] or handcuff bystanders if guns are known to be at premises [Muehler v. Mena, 544 U.S. 93 (2005)]; ***or***
   2. Belief person may be disposing or concealing of any contraband or things particularly described in the search warrant. [OCGA 17-5-28; Mercer, 251 App. 465, 554 SE2d 732 (2001); Mallard, 246 App. 357, 541 SE2d 46 (2000); Holmes, 240 App. 332, 525 SE2d 698 (1999)]. For belief of concealment, officer must show nexus with items searched for [Anderson, 195 App. 793, 395 SE2d 50 (1990); Hawkins, 187 App. 826, 371 SE2d 668 (1988)];

3. "Hurried manner"of leaving equated to "flight" [Underwood, 266 App. 119, 596 SE2d 425 (2004)];
4. Without such individualized justification, search of other persons on premises illegal [Norton, 283 App. 790, 643 SE2d 278 (2007)]. Justification for a weapons pat-down is articulable suspicion (see 1 above); for evidentiary search is presumably probable cause.
5. No requirement stop be immediate [Ferguson, 292 App. 7, 663 SE2d 760 (2008) (followed person with package to his car)].

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C. May detain (***Terry*** stop) occupants of premises for reasonable duration of search to prevent flight and request aid with search [Michigan v. Summers, 452 U.S. 692, 701-703 (III) (1981)]
   - If independent probable cause develops during the course of the search of the premises or approaching persons present, a warrantless arrest or search may be performed [Bryant, 304 Ga.App. 456, 696 SE2d 439 (2010) (in violent crime (rape and aggravated assault) could test item not listed on warrant to confirm likely stains for blood and then seize when confirmed)].; Sheats, 305 Ga.App. 475, 699 SE2d 798 (2010) ("apparent attempt to flee" by running within house upon entry for search); Claffey, 209 App. 455, 433 SE2d 441 (1993) (observing contraband in "plain view" while stopping arriving car); Travis, 192 App. 695, 385 SE2d 779 (1989) (flight); Michigan v. Summers, 452 U.S. 692 (1981) (evidence from search)].
   - "Plain view" of contraband may justify seizure even if police officers suspected the contraband in advance Smithson, 275 App. 591, 621 SE2d 783 (2005); *see* Horton v. California, 496 U.S. 128 (1990)] (see **3.14**A).
   - Such detention and questioning does not trigger *Miranda* [Lewis, 268 App. 547, 602 SE2d 278 (2004)].
   - If presence of weapons is suspected, Terry stop may include initial handcuffing of bystanders without individualized suspicion, but prolonged use of handcuffs may require more [Muehler v. Mena, 544 U.S. 93 (2005)].

D. May question (limited ***Terry*** stop) persons arriving, departing, or at the scene to determine identity and connection to the premises [Claffey, 209 App. 455, 433 SE2d 441 (1993) (auto belonging to another party arriving in front of premises - police may briefly detain vehicle, question occupants, and look in car)]:

1. ***However***, such limited stop does not authorize pat-down search [Holmes, 240 App. 332, 525 SE2d 698 (1999)];

2. Auto leaving place of search - Where search warrant is obtained to search residence, surrounding curtilage, and vehicles, but no separate probable cause exists to believe contraband is in car, results vary on whether vehicle can be chased down, searched, and driver returned [*Compare* Martin, 211 App. 849, 440 SE2d 736 (1994) (permissible to stop occupant driving away just before search less than mile from house, handcuff driver for return, and drive truck back to premises) *with* Crank, 212 App. 246, 441 SE2d 531 (1994) (not permissible to deliberately wait until occupant drives off, stop 2-3 miles away on public road, drive car back and perform inventory search)].

2.46 Manner of execution generally:

A. Copy of search warrant to be left with any person from whom items were seized, or, if no person available, left in a conspicuous place in the searched premises [OCGA 17-5-25]:
- Unsigned copy OK [Stafford, 277 App. 852, 626 SE2d 802 (2006)];
- Providing occupant with complete copy of valid search warrant ***may*** be constitutionally required when there are no exigent circumstances (occupant not threat and search not surreptitious wiretap) for failing to do so [*see* Groh v. Ramirez, 540 U.S. 551 (n.5) (2004)];
- In a thermal imaging "search," the failure to serve a copy of the warrant for a "day or two" did not render search invalid - no prejudice where no property, only image taken [Brundige v. State (Ga.App. #A11A0165, 7/14/2011)];
- Supporting affidavit need not be served ***if*** warrant itself has adequate description of premises to be searched and items to be seized [Amica v. State, 307 Ga. App. 276, 704 SE2d 831 (2010)] - no requirement for probable cause showing in papers served on defendant [Pass v. State, 309 Ga. App. 440, 711 SE2d 641 (2011)].

B. Use of force in execution [OCGA 17-5-27]: forcible entry authorized after verbal notice of authority when:
1. officer refused admittance;
2. no acknowledgment by occupants [*see* Swan, 257 App. 704, 572 SE2d 64 (2002) (3-5 second delay OK for entry through *unlocked* door on *drug* raid); Banks v. United States, 540 U.S. 31 (2003) (15-20 second delay on *drug* raid enough)];
3. property unoccupied.

C. Improper execution may result in suppression of search [Williams, 275 App. 612, 621 SE2d 581 (2005) (drug case with authorization for no-knock in warrant); Poole, 266 App. 113, 596 SE2d 420 (2004) (officers failed to adequately knock and announce)].

D. No presumption that nighttime execution is improper (unlike under Federal Rules) [Fair, 284 Ga. 165, 664 SE2d 227 (2008)].

2.47 Citations: STATUTES

No seal required [OCGA 17-5-22].
Return of warrant [OCGA 17-5-29].
Return to be made without delay to court of competent jurisdiction [OCGA 17-5-29].
Suppression motion is properly addressed only to the trial court, not a magistrate at a preliminary hearing [OCGA 17-5-30].
Warrant, affidavit (complaint) and return ***filed*** when warrant executed or returned not executed; warrant to be ***docketed*** at time of issuance on docket kept by judge [OCGA 17-5-22].

2.48 Citations: CASES

Advance Search Warrant - Court may issue search warrant in advance of item's arrival at location when there is probable cause to believe that the thing to be searched for will be at a location when the search is performed [524 So. 2d 988 (Fla. 1988)].
Computer search execution - seizure of material requiring further analysis to know if covered [*Compare* Grant, 220 App. 604, 469 SE2d 826 (1996) with Walsh, 236 App. 558, 512 SE2d 408 (1999)].
Even though no person named warrant valid if accurate place description [Hatch, 160 App. 384, 287 SE2d 98 (1981)].
Failure to make **return** does not invalidate warrant [Holloway, 134 App. 498, 215 SE2d 262 (1975); Waters, 122 App. 808, 178 SE2d 770 (1970)].
"John Doe" search warrant [Giles, 149 App. 263, 254 SE2d 154 (1979)].
No "good faith" exception to search warrant requirements [Gary, 262 Ga. 573, 577, 422 SE2d 426 (1992); Beck, 283 Ga. 352, 658 SE2d 577 (2008)].
Notice to produce cannot be used to avoid procedural requirements of search warrant in criminal case [Johnson, 156 App. 496, 274 SE2d 837 (1980)].
Officer with warrant may execute it anywhere within county jurisdiction of judge signing warrant [Varner, 248 Ga. 347, 283 SE2d 268 (1981)].
Particularity [Steele v. U.S. 267 U.S. 498(1925); Marron v. U.S., 275 U.S. 192 (1927)].
Place [Tomblin, 128 App. 823, 198 SE2d 366 (1973); Buck, 127 App. 72, 192 SE2d 432 (1972); Sanders, 155 App. 274, 270 SE2d 850 (1980); Vaughn, 141 App. 453, 233 SE2d 848 (1977)].
Subpoena cannot be used to avoid procedural requirements of a search warrant in a criminal case (DUI case involving subpoening medical records of the defendant) [King, 272 Ga. 788, 535 SE2d 492 (2000)].

2.49 Administrative Searches

Administrative searches or inspections of private property must be authorized by consent or search warrant; probable cause may be found in reasonable legislative or administrative standards for inspections (passage of time, area, type of building, etc.) or specific knowledge of condition violating regulation [Camara v. Municipal Court, 387 U.S. 523 (1967); *see* Yingsum Au, 258 Ga. 419, 369 SE2d 905 (1988)]. The authorizing statute must carefully limit their time, place, and scope. Nor may an authorizing statute commit the conduct of such an inspection to the unbridled discretion of the inspector. [Bruce v. Beary, 498 F.3d 1232 (11th Cir., 2007) (§ 1983 liability for excessive administrative search)]. There must be 'reasonable legislative or administrative standards for conducting an ... inspection.' [Camara]. 'Where a statute authorizes the inspection but makes no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply.' [Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970)]. Additionally, when the administrative inspection is a pretext for avoiding a criminal search warrant, that can be found improper. [Bruce].

Numerous statutory provisions authorize the magistrate court to issue such warrants and generally contain descriptions of the appropriate probable cause, form of affidavit, officer entitled to seek warrant, etc.

The following is a list of inspection warrants provisions applicable to magistrates:

2-2-11	Commissioner of Agriculture	2-13-13	commercial feed factories
4-11-9.2	Commissioner of Agriculture	10-1-148	sale of petrol products
12-2-2	Department of Natural Resources	12-8-70	hazardous wastes
12-13-8	underground storage tanks	16-13-46	State Board of Pharmacy
25-2-22.1	fire inspections	52-7-25	Boat searches

For jail and prison searches (see **2.15**F).
For searching fire-damaged property (see **3.14**C).
OCGA 40-16-2 alone ***fails*** to provide standards for administrative searches [Ponce, 271 App. 408, 609 SE2d 736 (2005), *remanded* for consideration of DMVS and PSC ***regulations*** at 279 Ga. 651, 619 SE2d 682 (2005), *on remand* regulations ineffective for failure to comply with APA (279 App. 207, 630 SE2d 840 (2006)].

2.5 WARRANTLESS SEARCHES (see **Chapter 3**)

2.6 RETURNS Return to be made without delay to court of competent jurisdiction [OCGA 17-5-29].

A. WARRANTLESS SEARCHES - A list of items seized by virtue of a warrantless search must be given to the person arrested and a copy to the judicial officer before whom said arrested person is taken for appearance. Failure does not invalidate search [See OCGA 17-5-2; Carson, 241 Ga. 622, 247 SE2d 68 (1978)].

B. SEARCH WARRANTS - A written return of all instruments, articles or things seized should be made without unnecessary delay before the judge issuing the warrant or a court of competent jurisdiction. Return should be signed under oath by the officer executing the warrant [OCGA 17-5-29].

NOTE - Failure to do return/inventory does not suppress the evidence [Holloway, 134 App. 498, 215 SE2d 262 (1975)].

NOTE - No exclusionary rule or motion to suppress in probation revocation cases [State v. Thackston, 289 Ga. 412 (2011)].
